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CITATION

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1971**

**No. 71-1011**

SAMUEL BRONSTON,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONER'S REPLY BRIEF

Petitioner Samuel Bronston submits the following for his reply brief.

### I. The Ambiguity Here, Which the Government Virtually Concedes, Was Not an Issue Submitted to the Jury Nor One Which Falls Exclusively Within the Jury's Province.

The Government now virtually concedes that the questioning was ambiguous (Gov. Brief, p. 9). Admitting that "you" could refer (a) to the company, or (b) to the individual, or (c) to both, the Government argues that only (b)

and (c) were "reasonable" interpretations. The Government further argues that "the most reasonable interpretation of the word 'you' employed by the examiner" was that it referred to them both. (*Id.*)

It is by no means self-evident that the question was not intended to ask about the company's accounts only; this was an examination directed to the assets of the company, in which the individual's assets would be involved only secondarily. Nor was the preceding question clearly directed at personal accounts, as the Government argues (Gov. Brief, fn. 4, p. 9). In the preceding question, "Do you have any bank accounts in Swiss banks, Mr. Bronston?", the words "Mr. Bronston" were used to address the witness, not to state the name in which an account was held, as the Government's brief seems to suggest. The witness still had to determine whether "you" referred to him or the company or both.

The main point on the ambiguity issue is that if perjury is to be charged, we should not have to guess at the meaning of the questions. As the comments to the Model Penal Code put it:

> "It does not seem unfair to require official interrogation to be sufficiently specific so that the verity of declarant's statements can be measured against something else than a guess as to how he interpreted the question." American Law Institute, Model Penal Code (Tent. Draft No. 6, 1957), § 208.20, Comments, p. 120.

The Government also argues that the question of ambiguity was submitted to the jury and is therefore foreclosed by the jury's verdict. There are two flaws, however, with this argument. The first is that the issue of whether the questioning was sufficiently precise to support a conviction for perjury has been considered in the cases as a question of law and should be so treated. See cita-

tions and argument at pages 12-13 of Petitioner's Brief. There was no evidence in the trial that bore on the question of ambiguity except the words of the 21(a) examination, which are as much before this Court as they were before the jury.

The second flaw in the Government's argument is apparent on a reading of the Court's charge, which shows that the issue of ambiguity before this Court was not given to the jury. The District Judge charged the jury on ambiguity only with respect to the second count, on which there was an acquittal, not to the first count, which is the subject of this appeal. The charge on ambiguity reads:

> "Now before we consider the second and third elements of the crimes charged I think a few observations would be in order.
>
> First, you are instructed that if you find that the defendant did not understand a particular question put to him by the questioner and therefore gave a non-responsive answer, that answer cannot be perjurious. One cannot wilfully state a falsehood in response to a question he does not understand.
>
> Similarly, *if you conclude that the questions were less precise than they should have been, this may not be permitted to prejudice the defendant. This may be relevant with regard to count 2 of the indictment,* for you must decide whether or not the questioner and witness understood the words 'ownership' and 'interests' to have the same meaning. This is, count 2 essentially charges that the defendant wilfully and knowingly falsely testified that the Spanish government owned the film Sinfonia Espanola and that he and the companies in which he had an interest did not own and have an interest in the film.
>
> If you conclude that there was no meeting of the minds, that the questioner and the witness did not understand the words 'own' and 'interest' in the same

sense, then you must acquit the defendant on the second count.

*Thus, in order to convict on count 2* you must be satisfied beyond a reasonable doubt that the defendant understood the terms used but nevertheless willfully gave a false answer.*'" (Emphasis added)

Govt. App. p. 44-5

The citations from the District Judge's charge in the Government's brief, insofar as they deal with the issue of ambiguity, were thus directed toward the deliberations on the other count, not on the count before this Court. The Government's reliance on the charge and the jury's verdict is misplaced.

## II. The Chamber of Horrors Conjured Up by the Government Arises From a Faulty Analysis.

The Government conjures up a chamber of horrors and attempts to imagine situations where, if petitioner prevails, witnesses can lie with impunity in the future through the device of material omissions. (Gov. Br., p. 19). This argument misstates the issue before this Court with respect to a truthful but unresponsive answer. (See Point I of Petitioner's Brief.)

No one questions the proposition that a responsive answer containing material omissions is a false statement. That type of answer, however, is not present in this case. Here we had a truthful answer, which, if the questioning is assumed to be unambiguous, and to refer to personal accounts, was at worst unresponsive. An answer's unresponsiveness does not deceive, as a material omission does; it can be corrected by further questioning. An an-

* One should remember moreover that the charge was delivered without the paragraphing inserted in the transcript.

swer that purports to be responsive evades correction through further questioning.

The point may be seen clearly by an analysis of the example with which the Government closes its brief. The Government argues:

> "For example, if a witness answers the question 'Who attended the meeting of June 1?' with the statement 'Smith and Brown,' it will be necessary to ask the further question 'Anyone else?' since the witness could, under petitioner's view of perjury, freely suppress the information that Jones and Robinson also attended." Gov. Brief, p. 20

This example misses the thrust of petitioner's argument. In the example the answer is false because it purports to be responsive but contains material omissions. The Government's hypothetical would, however, provide an accurate analogy to the instant case if, for example, with respect to a meeting attended by people of different races, the question asked was "Who attended the meeting of June 1?" and the witness answered, "Smith and Brown were the black men present." Assuming that this was true, but that Jones and Robinson, white men, were also present, the answer would be unresponsive. It would be apparent to the questioner that the answer was limited to one class of men, and thus unresponsive to the general question. It places no unreasonable burden on the questioner, to form a foundation for a charge of perjury, to require him, if he wants to ask about the presence of men who were white, or of races other than black, to ask the next obvious question, just as here the questioner, when receiving an answer about company accounts, if he wished to know about personal accounts, should have asked about them. Then if the responsive answer were false, by reason of material omissions or otherwise, there would be perjury; but if it were true, there would not be perjury.

Perjury arises only from a false statement, which is absent in the instant case.

To put it more analytically, if the answer purports to predicate facts of a class more limited than that referred to by the questioner, such an answer is unresponsive, but the proposition contained in the answer may still be truthful, as it was here. In the Government's example, the answer purported to give information about the same class as that referred to by the questioner. That answer, when it omitted facts, was false. Therein lies the distinction.

New York, New York, August 30, 1972.

Respectfully submitted,

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